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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22..06..2005

CORAM

THE HON'BLE MR.MARKANDEY KATJU, CHIEF JUSTICE
And
THE HON'BLE MR.JUSTICE F.M.IBRAHIM KALIFULLA

Tax Case (Appeal) No.29 of 2003

M/s.Express News Papers Ltd.,
Express Estates, Club House Road,
Chennai - 600 002. ..Appellant.

Vs.

The Deputy Commissioner of Income-tax,
Special Range IX,
Chennai - 34. ..Respondent.

PRAYER: Appeal filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, "C" Bench, Chennai in M.P.No.48/Mds/2002 in ITA No.2653/Mds/92 and 3016/Mds/92 dated 18.11.2002. (Appeal No.44/92-93/SR-IX dated 22.9.1992 on the file of the Commissioner of Income Tax (Appeals)-VIII,Chennai-34 against PAN/GIR No.47-005-CZ-5610 dated 25.3.1992 on the file of the Deputy Commissioner of Income Tax Special Range-IX, Chennai-34).

For Appellant :: Mr.V.S.Jayakumar
For Respondent :: Mrs.Pushya Sitaraman,
Sr.Standing Counsel for I.T.

J U D G M E N T

THE HON'BLE THE CHIEF JUSTICE

This appeal is filed under Section 260-A of the Income-tax Act, in which the following questions of law are said to be involved:-

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"*(i) Whether on the facts and in the circumstances of the case, the Tribunal was right in law in observing and directing the Assessing Officer to disallow the entire claim of depreciation if the facts are found that the scaffolding materials at the time of termination of lease is not recovered?*

(ii) Whether the Tribunal was right in law in exercising jurisdiction which results in enhancement of the assessment on the appellant when the Tribunal has no jurisdiction?

(iii) Whether the Tribunal was right in holding that the depreciation on scaffolding material is not to be allowed at the rate of 100%?

2. We have heard learned counsel for the parties, and have perused the material on record.

3. The assessee is a public limited company deriving income from property, finance and leasing business. The relevant assessment year is 1989-90.

4. The assessee claimed depreciation on the scaffolding material given on lease to M/s.Bhasin Associates Ltd., New Delhi at the rate of 100% on the ground that each of the scaffolding material costs less than Rs.5,000/-, and hence the entire value should be allowed as depreciation on the ground that each of the scaffolding material constituted a *"plant"* used for the purpose of business. The Assessing Officer, however, allowed appreciation only at the rate of 33 1/3%. The Assessing Officer held that the scaffolding material was an integrated unit and hence could not be bifurcated into several pieces of Rs.5,000/- each in value. Accordingly, he restricted the depreciation claim to the rate of 33-1/3% on the plant.

5. In appeal the CIT (Appeals) confirmed the order of the Assessing Officer restricting the claim of depreciation to 33-1/3% under Section 32(1)(ii) of the Income-tax Act (in short 'the Act'). The Commissioner of Income-tax (Appeals) observed:-

"*The Madras High Court in CIT Vs. Mysore Dasaprakash (177 ITR 38) has held that electrical switch boards, distribution boards and fittings form constituent parts of the entire electricity supply system as a whole and there was no scope for cutting up the aggregate expenditure into several parts as claimed by the assesseee. The benefit arising out of the installation of electricity switch boards, distribution boards, etc., was not confined to any particular room but were intended to regulate, distribute and make available electricity to all the rooms. Accordingly, considering the electricity system as an integrated whole, the expenditure incurred on it had to be treated as such and there was no scope for working out depreciation under the provision to*

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Section 32(1)(ii) by dissecting the electrical system into different component parts.

In the instant case, the scaffolding material leased out by the assessee company is found comprised of mainly pipes, right angles and swivel clamps and fixed base plates. Thus, the various items comprising the scaffolding cannot be used independently of each other but form constituent part of the entire scaffolding and act as a whole, i.e., an integrated unit. Thus, the scaffolding material being an integrated unit and one that is admittedly re-usable, there is no possibility of apportioning the expenditure to each item and allowing depreciation under the proviso to Section 32(1(ii). Restriction of the claim for depreciation to 33 1/3% is accordingly confirmed".

6. Both the assessee as well as the Department filed appeals against the order of CIT (Appeals), and they have been disposed off by the judgment of the Tribunal dated 02.04.2002.

7. In this case we are not concerned with the appeal filed by the Department before the Tribunal. We are only concerned with the appeal filed by the assessee.

8. By the order dated 02.04.2002, the Tribunal disposed off the assessee's appeal, but without considering its claim for allowing 100% depreciation instead of 33-1/3%. Hence the assessee filed a rectification petition under Section 254(2) of the Income Tax Act before the Tribunal, in which it was pleaded in paragraph 6: -

> *" It is further submitted that non-consideration of Grounds Nos.11 to 13 relating to the second issue namely allowance of 100% depreciation, Ground Nos.14 & 15 relating to the third issue namely disallowance of travel expenses of Director and Ground Nos. 16 - 18 relating to legal and professional services are mistakes apparent from which requires to be rectified"*

9. By the impugned order dated 18.11.2002, the Tribunal disposed off the rectification petition filed by the assessee by observing: -

> *"In our opinion scaffolding materials gets damaged when it is used for building construction and the lessor will not be able to get almost similar items that were leased out, though it is called lease, it appears to be sale. The income from leasing business shown by the assessee may be part of sale proceeds. However, the Department has treated it as capital asset and had allowed it depreciation at 33.33%. It is therefore necessary to find out*

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what transpired on the termination of the lease i.e., whether the assessee was able to recover the entire scaffolding materials or recovered none. In the event of the assessee recovering nothing from the scaffolding materials it may go to indicate that there is a sale. If the assessee recovered the entire 100% scaffolding materials, then obviously it is a lease. In the event of finding that it is a real lease and the materials were received back by the assessee then the A.O may consider the decision in Harijan Evam Nirbal Varg Nigam Ltd. v. CIT, (1998) 229 ITR 776."

10. Learned counsel for the assessee has submitted before us that while disposing off the rectification petition the Tribunal went beyond its brief by dealing with extraneous aspects of the issue of depreciation, which has the effect of enhancement of the assessment made on the assessee. Learned counsel also submitted that the observation of the Tribunal in paragraph 3 of its order dated 18.11.2002 that transaction though called a lease appears to be a sale was nobody's case. We agree with this submission. It may be mentioned that the assessee claimed that the scaffolding materials were given on lease to M/s.Bhasin Associates Limited treating it as a plant and the assessee claimed 100% depreciation thereon as the value of each of the items were less than Rs.5000/-. It was not the case of the department at any stage that the transaction was not a lease but a sale. The Department had also not at any stage contended that the assessee was not able to recover the scaffolding material. In these circumstances, we are of the opinion that it was not open to the Tribunal to carve out a new case, which was not the case of any of the parties before it. In our opinion, the Tribunal erroneously took into account irrelevant and extraneous factors while passing the impugned order dated 18.11.2002.

11. In *CIT v. Alagendran Finance Limited, 264 ITR 269 (Mad)* a Division Bench of this Court has held that each centering sheets are eligible for 100% depreciation in view of the proviso to Section 32(1)(ii) of the Act, since the cost did not exceed Rs.5000/- per sheet. In our opinion, on the same basis it has to be held that each of the scaffolding materials would constitute "plant" as defined in Section 43(3) of the Act.

12. It may be mentioned that the definition of the word "plant" in Section 43(3) of the Act is inclusive and not exhaustive, and hence it has to be given a wider meaning vide *CIT v. Taj Mahal Hotel, (1971) 82 ITR 44 and CIT v. Indian Turpentine & Rosin Company Ltd., (1970) 75 ITR 533 (All)*. The word "plant" therefore includes whatever apparatus or instruments are used by a businessman in carrying on his business. Even books and surgical instruments are treated as "plant" in the definition in Section 43 (3) of the Act. The word "plant" would therefore include any article or object, fixed or movable, used by a businessman for carrying on his business vide *CIT v. Taj Mahal Hotel (supra),*

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Sundaram Motors (P) Ltd. v. CIT, (1969) 71 ITR 587 (Mad), etc. Further, the word "plant" would mean and include apparatus used by a businessman for carrying on his business, and it is not confined to an apparatus used for mechanical operations or processes or industrial business vide *CIT v. Parke Davis (India) Ltd., (1995) 214 ITR 587 (Bom)*. In *CIT v. Parke Davis (India) Ltd. (supra)* it has been held that fans installed in the office premises of the assessee would constitute plant and would be eligible for depreciation.

13. It may be noted that the expression "plant" used in Section 32(1) (ii) of the Act (as it stood at the relevant time), and as defined in Section 43(3) of the Act, does not mean factory itself as one composite unit including all buildings, machinery and apparatus therein which are required for the purpose of factory. Under the scheme of the statutory provision, each apparatus conforming to the definition of machinery or plant, as the case may be, has to be taken individually for the purpose of considering the computation of depreciation and not the organization of the unit as a whole by treating each and every apparatus necessary for the function of the factory as forming an integral part of the factory vide *CIT v. Kiran Crimpers, (1997) 225 ITR 84 (Guj)*.

14. In *Cripps v. Judge, 13 QBD 583* scaffolding has been held to be a "plant".

15. In our opinion, the Tribunal went off on a tangent by observing that the facts need to be verified by the Assessing Officer as to whether the scaffolding materials have been really leased out or have been sold. In fact, it was nobody's case before any of the authorities that there was any disguised sale of scaffolding materials. A perusal of the entire record shows that the only dispute before the authorities related to the rate of depreciation i.e., as to whether it was 33-1/3% or 100%. The Tribunal had not even put the assessee on notice about the above observation at the time of hearing, and no opportunity was given to the assessee about the point raised *suo motu* by the Tribunal.

16. In view of the above, we set aside the impugned order of the Tribunal dated 18.11.2002 and hold that the scaffolding materials are entitled to 100% depreciation treating the transaction as a lease.

17. The appeal is allowed. There will be no order as to costs.

22.06.2005

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Sd/
Asst.Registrar

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Sub Asst.Registrar

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'C' Bench, Rajaji Bhavan, III Floor
Besant Nagar, Chennai-90.

2. The Commissioner of Income Tax
(Appeals)-VIII, Chennai-34.

3.The Deputy Commissioner of Income-tax,
Special Range IX,
Chennai - 34.

jrg (co)

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